WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, D. C.

ORDER NO. 837

IN THE MATTER OF:	Served July 10, 1968
W. V. & M. Coach Company)	Formal Complaint No. 20
)	
v.)	Docket No. 165
)	
Scenic Coach Rental, Inc.)	

APPEARANCES:

MANUEL J. DAVIS, Attorney for complainant, W. V. & M. Coach Company, Inc.

E. STEPHEN HEISLEY, Attorney for respondent, Scenic Coach Rental, Inc.

W. V. & M. Coach Company, Inc., (W. V. & M.) filed a formal complaint against Scenic Coach Rental, Inc. (Scenic Coach), in which it alleged that Scenic Coach had engaged in the transportation of persons for-hire between points in the Metropolitan District, that the transportation was not authorized by a certificate of public convenience and necessity issued by this Commission, and requested that a cease and desist order issue against Scenic Coach prohibiting it from engaging in any transportation unless and until a certificate of public convenience and necessity is issued.

Pursuant to our Rule 5-01, a copy of the complaint was served on the respondent by the Commission. An answer was filed by Scenic Coach.

In its answer, Scenic Coach averred that it was engaged solely in the bus-rental business, that it was authorized to do so by the Virginia State Corporation Commission, and that it had not engaged in the for-hire transportation alleged.

The parties met with the Staff in informal conference in an attempt to resolve the controversy. When the parties could not resolve the issues, the Commission set the matter for hearing.

On February 7, 1968, the hearing was held before an examiner. The transcript of the proceeding consists of seventy-six (76) pages of testimony and four (4) exhibits. The complainant presented the testimony of four witnesses; one witness was offered by the respondent.

THE EVIDENCE

Mr. S. A. DeStefano, President of W. V. & M., stated that a representative of the American Field Service (AFS) placed with his company two orders for charter service, to be performed on July 12 and 14, 1967. These orders were subsequently cancelled. The witness stated that since his company had previously provided charter service for AFS, he ordered one of his company employees to determine if some other person or carrier had been selected to provide the service.

A W. V. & M. supervisor testified that he observed a group from the AFS being transported on July 12 and 14 in buses owned by Scenic Coach.

A representative of the AFS was subpoenaed by W. V. & M. and testified about the July 12 movement. She acknowledged that she had originally placed a charter order with W. V. & M. Prior to the time the transportation was to be performed, she had been informed of another company which would do the job cheaper. She stated that she cancelled the charter service order with W. V. & M. and contacted Scenic Coach. She further testified that her group had leased a bus from Scenic Coach to take a group from Falls Church, Virginia to the Capitol in the District of Columbia, and return. She stated that she had signed a lease agreement and that Scenic Coach had provided the driver for the vehicle. Under the terms of the agreement, a check for $40.00 was paid to Scenic Coach.

It was stipulated that a second representative of the group who had arranged for the July 14 transportation, if called, would have testified generally to the same effect as the first witness.

Mr. Brady Stainback, President of Scenic Coach, was the sole witness for the respondent. He stated that Scenic Coach was formed to engage in the leasing of bus equipment and had been so licensed by the State Corporation Commission of Virginia. He stated that Scenic Coach would lease its equipment either under a mileage or an hourly charge, whichever was greater. A lease agreement form had been composed which provided that the lessee was to pay for the use of the vehicle, hire a licensed chauffeur to operate the bus, to indemnify and hold harmless the lessor "from and against all damages from the negligent use. . ." of the vehicle, and agreed to compensate the lessor for any damage to the bus sustained while in the possession of the lessee (R. Ex. 1).

Mr. Stainback also testified that he required a chauffeur agreement to be executed. This agreement is a statement by the chauffeur that he agreed to operate the coach for the lessee, under certain terms, and represented that he was licensed as a chauffeur (R. Ex. 2). Mr. Stainback verified that a representative of AFS had leased one of his buses on the dates above noted, that the lease agreement had been executed by himself and the group representative, and that the lessee had paid him for the bus pursuant to the terms agreed upon. He admitted that Scenic Coach had not only paid the drivers for these two transportation movements, but had done so on all previous leases. He stated, however, that he had been advised that Scenic Coach should not be a party to the payment of the driver. Accordingly, Scenic Coach no longer indulges in this practice.

Mr. Stainback stated that for the convenience of the lessees, he maintains a list of qualified drivers. The list, comprising the names of 43 men, is available from Scenic Coach to any lessee that does not have its own driver. He maintained, however, that these drivers are not employees of Scenic Coach, that Scenic Coach exercises no control over them, that the lessee now has to pay them direct for their services, and consequently Scenic Coach does not -- in fact, never has -- carry them on any payroll accounts such as social security and unemployment compensation. However, he conceded that all of his lease trips had been driven by one of the men whose names appear on the list.

Scenic Coach maintains public liability and damage insurance on its buses. The insurance is for the protection of the owner

and the passengers as well. Mr. Stainback stated that the lessee is not included within the scope of the policy; moreover, under the terms of the lease, the lessee is required to secure insurance. However, he acknowledged that "the people" [apparently the lessee] paid for the insurance as part of the $40.00 fee.

W. V. & M. contends that the facts of the July 12 and 14 movements clearly prove that Scenic Coach was a "carrier"[1/] engaged in the transportation of passengers for hire between points in the Metropolitan District. W. V. & M. also contends that in substance Scenic Coach will continue to operate as a carrier; it views the agreements as merely an artificial device to shield Scenic Coach from a carrier status.

It is the position of Scenic Coach that it was not a carrier insofar as the July 12 and 14 movements are concerned. Apparently, it takes the view that Scenic Coach's payment of the drivers for those transportation movements, when viewed in relation to all the other facts, was not sufficient to warrant the conclusion that Scenic Coach was a carrier.

Moreover, Scenic Coach contends that even if we so conclude, a cease and desist order is not warranted because the change in its policy now prohibits it from paying the driver or acting as a conduit by which the lessee forwards certain fees or payments which should more appropriately be paid directly.

DISCUSSION AND CONCLUSION

In detrmining the party who in reality is performing a given transportation service, the overall test of substance involving an inquiry into all pertinent factors -- including control, responsibility, and assumption of financial risk -- is the decisive consideration. Usually, no single factor is by itself conclusive. See United States v. Drum, 82 S. Ct. 408 (1962). In the final analysis the question is: does the

---

1/ "The term 'carrier' means any person who engages in the transportation of passengers for hire by motor vehicle, street railroad, or other form or means of conveyance." Article XII, Section 2(a), Compact.

purported carrier assume to a significant degree the characteristic burdens of the transportation business? Hence, a lessee in a bona fide vehicle-lease arrangement resulting in private carriage must (a) control, direct, and dominate the operations and (b) assume the responsibilities, the risks, the duties and the burdens of transportation. For instance, though a lessee may have operational control over the vehicle, and driver, the lessee is not a bona fide private carrier if the lessor rather than the lessee is actually controlling and directing the transportation service.

With this in mind, we now turn our attention to the initial method of operation engaged in by Scenic Coach and frankly state that it has raised serious questions in our minds as to its propriety.

It is true that there is no direct evidence of a holding out by the respondent to perform services for the general public, except that of vehicle leasing. This record is devoid of any evidence to indicate that the July 12 and 14 movements are representative of the bulk of Scenic Coach's business or whether such arrangements amount to only a miniscule portion of the leasing engaged in by the respondent. The only evidence adduced by the parties to the proceeding, aside from the July 12 and 14 movements, was the statement presented by the respondent's president that it also leases its vehicles to authorized common carriers, such as Virginia Stage Lines.

However, even if the July 12 and 14 movements are infrequent examples of respondent's activities with non-carrier clients, it must be prohibited if in fact it constitutes common carriage.

The facts require us to consider whether the relationship between the respondent and the drivers form a concerted action to provide a for-hire transportation service.

A bona fide lease excludes the furnishing or providing of drivers. Respondent claims that it did not and does not furnish drivers, but merely furnishes a list of qualified operators to lessees unable to provide a driver of their own. Clearly, however, its prior practice went far beyond the mere furnishing of such a list. The driver is seemingly divorced from the lessor, at least on paper, but there is little doubt

that he does depend upon the respondent for income. Thus, there is a strong economic relationship between the person providing the vehicle and the person hired to drive it. It would be unrealistic for us to assume that a mere paper document effectively divorces the driver from any relationship with the lessor. In fact, as noted, under the initial arrangement, the lessee paid the lessor only a flat fee; the lessor in turn actually paid the driver for his services. This, we find, constitutes a presumption of for-hire carriage which on this record is not refuted. U. S. v. Casale Car Leasing, Inc., Fed. Car. Cases 53,731.

Furthermore, the flat $40.00 rate charged not only included the driver's wages but also certain insurance payments. And, as noted, the lessor's insurance program includes passenger coverage. We also note that it is not insignificant to us the ease with which the lessee or contracting party switched from casual charter type trips to an operation entailing the assumption, in a significant degree, of the major burdens of transportation. Regardless of the nature of the paper provisions, it is the economic reality behind the arrangements, and not their form, which is crucial in the determination of the status of a specific operation. Accordingly, we are further convinced that respondent's lease of vehicles to passenger groups -- in its initial phases of operation, at least -- and the subsequent transportation constitute a charter service. See Fordham Bus Corp. Common Carrier Application, 29 MCC 293. The basic nature of the service offered by respondent is not altered by the provision of the lease designed to place ostensible control in the hands of the lessee. Even though the passenger group is said to pay the driver and the cost of insurance, it is clear that this practice is only a financed adjustment whereby the lessee or passenger group pays a part of the transportation cost the carrier respondent must otherwise pay. Any assumption of responsibility by the lessee -- even ignoring the conduit payment method -- is nothing more, in our opinion, than a rate adjustment.

Considering the manner in which the operations in question function in reality, rather than the designation given to them by respondent, it is certain that the design and plan of respondent's initial leasing scheme was one which evaded regulation due to its form, not its substance. Obviously, the purpose of economic regulation cannot be frustrated by such arrangements.

While we do not condone those past operations which we find have been conducted in an unlawful manner, we conclude that in light of respondent's asserted revised method of operations (perhaps, an effort to comply with our requirements) a cease and desist order going to those past methods would not now be appropriate. Respondent is cautioned that in view of our finding, any recurrence of the prior method of operation will be dealt with severely and without delay.

On the present record, we cannot reach a final conclusion in respect to respondent's present operations. We cannot determine if the changes constitute only paper compliance to further avoid regulation or if they are indicative of a genuine effort to conform fully with our requirements. For example, the degree of control exercised by respondent over the drivers is unclear. While the selection of the driver theoretically rests with the lessee, it has been demonstrated that some -- and perhaps all -- lessees look to the lessor to help select and/or contact one of the men on lessor's list to drive the vehicle; this appears to be especially true where the lease is on a one-day, one-trip basis. Moreover, there is nothing in the record to indicate who controls the driver once the selection is made. Therefore, we are unable to make the requisite finding that the lessee in fact controls, directs, and dominates the performance of the service. Something more is required.

Since this matter arose upon complaint, the burden of proving the violations alleged rests upon the complainant. It has fallen short of supplying sufficient evidence to satisfy that burden. Hence, we shall dismiss its complaint. Nevertheless, doubt does exist in our minds as to the legality of respondent's operations. The public interest requires that we use diligence to prevent evasions of regulation through artificial devices. Consequently, we will direct the staff to institute a thorough and complete investigation of respondent's present operations. Based on the results thereof, the staff shall include in its report appropriate recommendations on the need for the initiation of formal proceedings.

THEREFORE, IT IS ORDERED:

1. That Formal Complaint No. 20 be, and it is hereby, dismissed.

2. That the Commission staff undertake an investigation of respondent's operations and respond in writing to the Commission, the respondent, and the complainant.

BY DIRECTION OF THE COMMISSION:

Melvin E. Lewis

MELVIN E. LEWIS
Executive Director